

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
BRIEF &
APPENDIX**

75-2016 B

IN THE UNITED STATES COURT OF APPEALS ~~MAY~~ 22 1975
FOR THE SECOND CIRCUIT

NO. T - 4216

JOE L. JOHNSON,

Appellant

versus

UNITED STATES OF AMERICA,

Appellee.

and Appendix

BRIEF OF APPELLANT

A

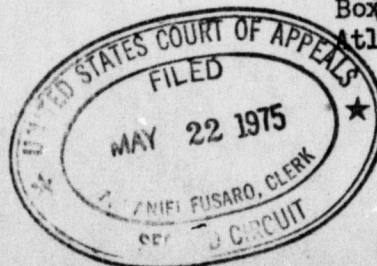
ON APPEAL FROM THE UNITED STATES DISTRICT
COURT FOR THE EASTERN DISTRICT OF NEW YORK
BROOKLYN, NEW YORK - CIVIL NO. 74Cl304

For the Appellee:

David G. Trager, Esq.
United States Attorney
Eastern District of New York
225 Cadman Plaza East
Brooklyn, New York

For the Appellant:

Joe L. Johnson, Appellant
In Propria Persona
United States Penitentiary
Box PMB - 71274-158
Atlanta, Georgia 30315



PAGINATION AS IN ORIGINAL COPY

STATEMENT OF THE CASE

Appellant was indicted by a Grand Jury on November 5, 1970. Through a series of Government induced delays, the Appellant was brought to trial in October 1972 on the seven (7) count indictment charging various violations of various related offenses.

On December 11, 1972, the appellant was sentenced to a total of fifteen (15) years imprisonment, after a finding of guilty of five (5) of the seven (7) counts in the indictment.

On April 6, 1973, the Court of Appeals for the Circuit affirmed the conviction, with the appeal issues being: (1) Search and Seizure; (2) Denial of a speedy trial; (3) Court denial of severance of the counts.

In the instant case, the Honorable Judge Travia denied petitioner's Motion to Vacate Sentence and relied erroneously on the statement that the issues presented as to the denial of a speedy trial had previously been dealt with in this Court. The speedy trial issue could not have been litigated when the basic issue raised is the ineffectiveness of counsel at the trial.

Petitioner directed 2255 motion to the Honorable Chief Judge Jacob Mishler for a re-hearing, and to have Judge Travia sequestered and to be called as a witness in the proceeding.

It was further nexessary that trial counsel and prosecutor be called as witnesses for invading the province of the jury; suppressing evidence, and was in colusion with Judge Travia and that Judge Travia

did deny petitioner the right to the Sixth Amendment right to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor.

For all the above reasons the Honorable Chief Judge Mishler saw fit to put petitioner's motion in the hands of Judge Costantino.

The Honorable Judge Constantino erroneously denied petitioner's motion relying on the Honorable Judge Travia's decision when there were other issues raised in the re-hearing that were not presented in the original petition and should have been litigated.

In Brown vs U. S., 468 F.2d 897 (1972), 5th Circuit 1972, Ingraham, Circuit Judge said, page 898: "The district court has denied without an evidentiary hearing the appellant's motion to vacate his federal sentence pursuant to Title 28 U. S. C., Section 2255. We vacate and remand."

Page 898:

"Furthermore, the district court must consider the merits of issues raised on direct appeal."

Kaufman vs U. S., 1969, 394 U.S. 217, 89 S.Ct. 1068, 22 L.Ed. 227

Randall vs U.S., 5th Cir. 1972, 454 F.2d 1132

"We therefore vacate the judgement below and remand to allow the district court to consider the merits of those issues."

"On remand, the court below will also make findings of operative facts and conclusions of law on all of appellant's allegations."

JURISDICTION

The jurisdiction of this Court is invoked pursuant to Rule 24, Federal Rules of Appellate Procedure, Title 18; Title 28, U.S.C., Section 1915, and the ORDER dated December 10, 1974 by District Judge Constantino, granting permission to proceed on appeal in forma pauperis. The ORDER being a part of the record on appeal transmitted by the District Court to this Court.

ISSUE PRESENTED

- I. The District Court erred in not granting an Evidentiary Hearing pursuant to 28 U.S.C. § 2255.
 - (a) An evidentiary hearing was mandated when the response of Bernard J. Fried, Assistant United States Attorney, answered with an affidavit "off-the-record" concerning the trial judge. See: Taylor vs United States, 487 F.2d 307 (1973).
 - (b) That he was denied effective assistance of counsel in that his attorney was under investigation for fixing cases at the time of Petitioner's case, consequently could not act.
 - (c) That at the time of sentencing the petitioner's attorney made prejudicial statements that would influence the Court to impose a sentence greater than would have been imposed by stating: "That the defendant was in the narcotics business for the profit 'no doubt about it' but that he was sorry for it." Such a statement by counsel precludes the defendant from defending

against such a negative by his own counsel.

(d) That counsel, after being dismissed by the appellant, filed a Brief on Appeal without consulting with appellant concerning the issues to appeal.

(e) That counsel never properly presented the factual issues surrounding the denial of his Sixth Amendment right to a fair and speedy trial for he did not know the whereabouts of the witnesses in his favor.

(f) That the Court did not give petitioner the right to be confronted with all witnesses against him. See: Pointer vs Texas, 380 U.S. 400 (1965).

(g) And that Court did not give petitioner the right to a meaning confrontation with witnesses in his favor or otherwise.

(h) That the Judge, the Assistant U. S. Attorney, Petitioner's Attorney were in collusion and withheld evidence. See: Transcript.

(i) Judge, U. S. Attorney and Petitioner's Attorney invaded the province of the jury. See: Transcript.

ARGUMENT AS TO ISSUE

(a) It is well established in this Circuit, and within the holdings of Title 28, United States Code, Section 2255, which states in pertinent part as follows:

"....unless the motion and the files and records of the case conclusively show that the prisoner is entitled to no relief, the Court shall cause notice thereof to be served upon the United States Attorney, grant a prompt hearing thereon, determine the issues, make finding of fact and conclusions of law with respect thereto..."

This Court has ruled in Taylor, supra:

"Where a federal prisoner raises issue which would require a new trial if factually sustained and he presents a sufficient affidavit in its support, an opposing affidavit by Government is not part of 'files and records' of the case which can be taken to conclusively show that prisoner is entitled to no ~~vacation of sentence~~ relief, within statute providing that motion for vacation of sentence may be filed at any time, unless files and records of the case conclusively show that prisoner is entitled to no relief..."

In the instant case the appellant submitted an affidavit of fact that was sworn to, under oath, and only partially replied to by the affidavit of the Assistant United States Attorney who acted contrary to this Circuit's holdings in Taylor, supra, in that the conclusatory statements in the A.U.S.A.'s affidavit could not have been taken from his "files and records" of the case.

(b) The Sixth Amendment to the Constitution requires that an accused shall have the assistance of effective representation of counsel. It is well established the counsel is not to be interpreted as errorless counsel, but one who can be expected to give representation in a competent manner uninterrupted by any other obligations, or thoughts, or concern that would impinge on his ability to render effective assistance. Basically, the type representation to be expected in a criminal proceeding was outlined

by the Supreme Court in Johnson vs Zerber, 304 U.S. 458 (1958); and Powell vs Alabama, 287 U.S. 45 (1932), which are perhaps the two leading cases in this area. In Johnson, supra, Justice Black wrote:

"The Sixth Amendment.....embodies a realistic recognition of the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty, wherein the prosecution is presented by experienced and learned counsel." 304 U.S. at 462-463

Justice Southerland expressed a similar sentiment in Powell, supra:

"The right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." 287 U.S. at 68-69.

Cannon 6 of the Code of Professional Responsibility is titled:

"A lawyer should represent a client competently"

The first four ethical considerations of Cannon 6 urge lawyers to develop proficiency or decline employment, to prepare adequately and to protect the interests of their clients properly. 6 ABA Code of Professional Responsibility, E.C. 6-1 to 6-4.

The rationale as shown in Glasser vs United States, 315 U.S. 60 (1942), related to a conflict of interest wherein one attorney represented two defendants at the same time, and held that such representation can vitiate a conviction and that a serious duty rests upon the trial judge to insure that both defendant's rights are protected. 315 U.S. at 71. Interestingly, the Supreme Court placed the burden on the trial judge's failure in Glasser to ascertain on the record each defendant's knowing and intelligent decision to proceed with a common counsel as:

"...a dangerous laxity on the part of the trial court in the discharge of its duty to preserve the fundamental rights of an accused."
315 U.S. at 72.

Some Courts have gone so far in applying the Glasser rationale as to hold that:

"...only where we can find no basis in the record for an informed speculation that appellant's rights were prejudicially affected can the conviction stand."
Lollar vs United States, 376 F.2d 243
at 247 (D.C. Cir. 1967).

The instant case involves a knowledgeable understanding of the trial judge that the petitioner/appellant's counsel was then under investigation for charges emanating from alleged attempts to "fix cases" in which the Court itself was familiar with. The Court should not only have excluded itself from hearing the case, but should have conducted a hearing to determine whether counsel for the appellant was capable, under the circumstances, to render aid and assistance effectively.

(c) That counsel precluded proper allocution for mitigation of sentence by making statements, prior to sentence, that was contrary to the best interest of the petitioner as well as unethical on the part of counsel who showed his proper preparation for the presentation of the case on behalf of the petitioner/appellant to be completely lacking. Counsel in stating that the defendant was in the narcotics business for the profit "no doubt about it" but that he was sorry for it, precluded the appellant from a fair and just sentence as well as effectively caused his attorney to be a witness against him on appeal. The statement of counsel was inexcusable, unethical, and a prejudicial denial of the petitioner/appellant's

opportunity to allocute in mitigation of sentence and for a fair prosecution on appeal.

It was held in United States vs Looney, 501 F.2d 1039, wherein the Court of Appeals for the Fourth Circuit held that where the severity of sentence was imposed was influenced by private information which the judge elicited after the trial and which lacked support in the record, and where defendant's were denied the opportunity to challenge such information, defendants sentences should be vacated. Such is the case at bar, wherein the appellant's own counsel was instrumental in causing erroneous, unsupported information to be placed on the record highly prejudicial to the defendant/appellant.

In United States vs Savage, 486 F.2d 890 (1973); the Court reversed the decision of the lower court in denying motion to vacate sentence, where counsel spoke of a prior record of the defendant and not the Court.

(d) Counsel was dismissed by the defendant after the trial for the many errors committed during the course of the trial as heretofore shown, as well as:

1. Failing to ask for a different judge to hear the case knowing the Court was involved in testimony of taped conversations in the case of United States vs Bynum, 475 F.2d 832 (2nd Cir) in which Judge Travia had issued an order authorizing electronic surveillance, and testified concerning this order, wherein the defendant's name was mentioned in the recorded conversations.
2. That the above case was the same case in which appellant's counsel was involved in criminal investigation at the time of appellant's trial.

3. That as the petition for rehearing relates the counsel was reprimanded by the court as follows: "Mr. Salarnay, you promised Mr. Narbaugh you wouldn't use that against him." Such an agreement between a court and counsel without consent of the appellant is a direct violation of due process. See: United States vs Kenny, 462 F.2d 1205, where the court held that "Basic fairness is expected from a trial judge."
4. That the Court, counsel and Assistant United States Attorney went into the jury room without the presence of the defendant contrary to Rule 43, Federal Rules of Criminal Procedure, T.18 without objection of counsel.

(e) That counsel denied the petitioner his right to his Sixth Amendment right to a speedy trial by not properly presenting the prejudice emanating from the denial. The Supreme Court in Barker vs Wingo, (1972) 407 U. S. 514, 92 S.Ct. 2182, 33 L.Ed. 101, decided the criteria for a judge to determine whether a denial of the right did indeed occur. In Barker, Mr. Justice Powell, writing for the unanimous Court analyzed the problem in three parts, First, he examined the nature of the right; Second, he rejected as "too rigid" two suggested methods for determining whether the right had been denied; Finally, he concluded that limits to the right should be determined on a case by case basis using a balancing test "in which the conduct of both the prosecution and the defendant are weighed." In the instant case the record on appeal and the prejudice caused by the delay are a prima facie showing of the denial of the right.

(f) Trial Judge denied petitioner right to cross-examination of the two Agent's story about a third party used by Agents. Agent Ryan testified that someone had given information that the petitioner was seen on the day before and was armed and dangerous. See: Michelson vs U. S., 1948, 69 S.Ct. 213, 218, 355. Agent McMillan testified that he did not know the

petitioner until informant took him to the petitioner, it was necessary to call the informer. For the prejudiced testimony of the two agents see: Pointer vs Texas, 380 U.S. 400 (1965); See: Roviaro vs U.S., 77 S. Ct. 623; See: Heard vs U. S. (C.C.A. 8th 1919) 225 f., 829, 832, "A full cross-examination of a witness upon the subjects of his examination in chief is the absolute right, not the mere privilege, of the party against whom he is called, and denial of this right is prejudicial and fatal error."

Therefore, without the petitioner bein able to cross-examine Agent's story of such hear say testimony is a denial of a fair trial.

CONCLUSION

I do not have the professional legal skill to protect myself so I am asking and PRAYING that this Court protect my constitutional rights.

The appellant also PRAYS that for all the reasons shown in the record on appeal, as well as those shown herein, this Court must remand for an Evidentiary Hearing, in accordance with the ruling in Sanders vs U.S., 373 U.S. 1 (1963); Fay vs Noia, 372 U.S. 391 (1963); Townsend vs Sain, 372 U.S. 293 (1963); U. S. vs Hayman, 342 U.S. 205 (1952) and Kaufman vs U.S., 394 U.S. 217 (1969). This Court is duty bound to remand for an Evidentiary Hearing.

State of Georgia)
: ss
County of Fulton)

Sworn to and subscribed before me
this ___ day of _____, 1975.

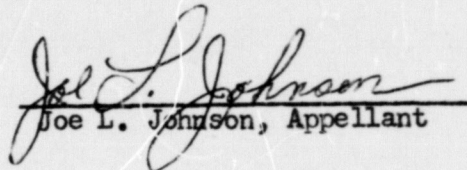
Parole Officer

Respectfully submitted,

Joe L. Johnson
Joe L. Johnson, Appellant

CERTIFICATE OF SERVICE BY MAIL

I, the undersigned, hereby certify that I am the appellant in the foregoing Brief of Appellant and that I have served a copy of the Brief to David A. Traeger, Esq., United States Attorney for the Eastern District of New York, 225 Cadman Plaza East Brooklyn, New York, 11201, by mailing it certified mail - return receipt requested on this 29 day of April, 1975.


Joe L. Johnson, Appellant

А

TITLE OF CASE

ATTORNEYS

For Plaintiff: Joe L. Johnson
Pro Se

UNITED STATES OF AMERICA

U.S. Penitentiary

P.M.B. 71274-158

Atlanta, Georgia 30315

For Defendant:

BASIS OF ACTION: PURSUANT TO SEC. 2255

(Related Case 70-CR-768)

JURY TRIAL CLAIMED

ON

[illegible]

ABSTRACT OF COSTS

RECEIPTS, REMARKS, ETC.

[illegible]

ABLE

74C 1304

JOE L. JOHNSON vs. UNITED STATES OF AMERICA

DATE	FILINGS—PROCEEDINGS	AMOUNT REPORTED IN EMOLUMENT RETURNS
9-10-74	MOTION FILED TO VACATE SENTENCE (70-CR-768)	1
10-24-74	Government's Memorandum of Law filed.	2
10-25-74	Affidavit of BERNARD J. FRIED, Assistant U.S. Atty., filed in opposition, etc.	3
11-1-74	BY TRAVIA, J. Decision and Orser filed. ORDERED that the petitioner's application to set aside his judgment of conviction and sente is DENIED. The Clerk of Court is directed to send a copy, etc., to petitioner. (See Decision)	4
11-4-74	Copy of letter of Clerk of Court filed dated Nov. 4, 1974 addressed to petitioner herein re enclosure of a copy of memo., etc.	5
12-6-74	PETITION FILED FOR A REHEARING, etc.	6
12-6-74	Motion for permission to proceed on appeal in forma pauperis, filed.	7
12-10-74	BY COSTANTINO, J. MEMORANDUM and ORDER FILED. Upon a review of Judge Travia's decision the application for a rehearing is DENIED. Leave to proceed on appeal in forma pauperis is granted. SO ORDERED. (See Memo., etc.)	8
12-24-74	NOTICE OF APPEAL FILED.	9
12-24-74	Copy of "Notice of Appeal" was on this day mailed to Clerk, U.S. C.A., together with FORM C" <i>Am'd</i>	
12-24-74	Copy of "Notice of Appeal" was on this day mailed to U.S. Atty <i>Am'd</i>	

457551
JAN 15 1975
R. B. Barrett
B. J. Barrett

B

only copy available

2

cc

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

FILED
IN CLERK'S OFFICE
U. S. DISTRICT COURT E.D. N.Y.

NOV 1 - 1974

----- x
JOE L. JOHNSON,

Petitioner,

-against-

UNITED STATES OF AMERICA,

Respondent.
----- x

TIME A.M.
P.M.

74-C-1304

DECISION AND ORDER

November 1, 1974

TRAVIA, D. J.

Petitioner moves for an order pursuant to Title 28 U.S.C. § 2255 setting aside his judgment of conviction and sentence. In support of his application, the petitioner avers:

(1) That the petitioner was denied his Constitutional right to a speedy trial; and

(2) that the petitioner was not afforded the effective assistance of counsel.

On November 5, 1970, a Grand Jury sitting within the Eastern District of New York handed up a seven count indictment charging the petitioner with various heroin-related offenses. Thereafter, in October 1972, the petitioner was convicted, after a jury trial, on five counts of the indictment. The petitioner was then sentenced on December 11, 1972

(4)

to a term of fifteen years in prison.

The petitioner took an appeal from his judgment of conviction and raised, among other things, the same issue of denial of his Sixth Amendment right to a speedy trial as is presented in the § 2255 motion at bar. On April 6, 1973, the Court of Appeals for this Circuit affirmed the petitioner's conviction and thereby tacitly found the petitioner's speedy trial argument to be without merit. Consequently, this issue need not detain us here. ^{/1} See, e.g., Meyers v. United States, 446 F.2d 37 (2d Cir. 1971).

The petitioner's claim of ineffective assistance of counsel is also infirm. The standard for demonstrating ineffective assistance of counsel in this Circuit is a stringent

^{/1} However, it should be noted that in certain circumstances, a district court may entertain a § 2255 motion even though an appeal was taken from the original conviction. For example, where it is unclear whether the issue presented to the district court was raised on appeal or whether the appellate court's decision was on the merits, the district court may hear the matter in order to make sure that the petitioner has been afforded one adequate litigation. See Kaufman v. United States, 394 U.S. 217, 230-231 (1969). Here, in contrast to the situation envisioned by the Supreme Court in Kaufman, the petitioner's speedy trial claim has been presented to the appellate court and a decision was rendered on the merits. As a result, re-litigation of this issue at the district court level is inappropriate.

one. As stated in United States ex rel. Crispin v. Mancusi, 448 F.2d 233, 237 (2d Cir. 1971):

"To be entitled to relief, petitioner must show that 'the purported representation by counsel was such as to make the trial a farce and a mockery of justice,' representation that is so deficient as 'to shock the conscience of the Court.'" (Citations omitted).

The petitioner points to several alleged irregularities which he claims deprived him of the effective assistance of counsel. First, the petitioner maintains that his attorney, Kenneth Sallaway, Esq., was under investigation for fixing cases at the time of the petitioner's trial. Even assuming that this allegation is true, it is difficult to conceive how such a set of circumstances could have deprived the petitioner of the effective assistance of counsel in a totally unrelated case. Secondly, the petitioner contends that during the course of the aforementioned investigation, tape recordings were made which the court listened to prior to sitting on the petitioner's case. The court listened to no such tape recordings. Thirdly, it is the petitioner's position that he was prejudiced by the fact that the court testified in United States v. Bynum, 360 F.Supp. 400 (S.D.N.Y.1973) ^{/2}

^{/2} The related historical citations of the United States v. Bynum, 360 F.Supp. 400 (S.D.N.Y. 1973), case have been omitted as the merits of Bynum are not applicable to the instant § 2255 motion.

a case in which the petitioner's attorney was a defense counsel. While it is true that the court testified in Bynum and that the petitioner's attorney was a defense counsel, it is difficult for the court to understand how events surrounding the Bynum case have anything to do with the effectiveness of counsel's representation in a completely different and unrelated criminal action. Lastly, at the time of sentencing, the petitioner's attorney related to the court that the defendant was in the narcotics business for profit but that he was sorry for it. The petitioner now claims that this statement was erroneous and untrue. As the Government correctly points out in its opposing papers, the fact that such a representation was made to the court can, at best, only be characterized as a mistaken choice of strategy, the wisdom of which cannot be scrutinized by this court. United States v. Gonzalez, 321 F.2d 638, 639 (2d Cir. 1963).

In sum, the record and files in this matter conclusively show that the petitioner is not entitled to relief and therefore no hearing is necessary. Hodges v. United States, 368 U.S. 139 (1961).

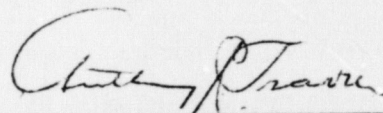
Accordingly, it is

ORDERED that the petitioner's application to set aside his judgment of conviction and sentence pursuant to



Title 28 U.S.C. § 2255 is denied.

The Clerk of the Court is directed to send a copy of this Decision and Order to the petitioner.



U. S. D. J.